Nos. 90-408 and 90-577

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

COUNTY OF YAKIMA, *et al.*,
Petitioners,
v.
CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA NATION,
Respondents.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA NATION,
Cross-Petitioners,
v.
COUNTY OF YAKIMA, *et al.*,
Cross-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE WASHINGTON STATE ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

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The Washington State Association of Counties (WSAC) respectfully submits this brief in support of the petitioners/cross-respondents, County of Yakima, et al.

INTEREST OF THE AMICUS CURIAE

The Washington State Association of Counties (WSAC) consists of the county governments in the State of Washington.

In twenty-six states the Bureau of Indian Affairs has jurisdiction over more than 1000 acres of reservation or trust lands. In these states alone, the total acreage of such land exceeded 53 million acres in 1985, an area larger than all New England and the eastern third of New York State. Approximately 2,500,000 acres of such land existed in Washington at that time. No accurate figures are known on the portion of such land which is Indian-owned, but of the approximately 79,046 residents of such land in Washington, approximately 10,440 were Indian, or about 21% in 1980.[1]

County members of WSAC have since statehood been the instruments of state government responsible for assessment and collection of tax liens for the state and all taxing districts, upon all land within Indian reservations in the state, except property of the United States, of the state or its political subdivisions and of that held in trust by the United States for Indians. WSAC member counties, and most other political subdivisions of the state of Washington are primarily dependent upon such tax revenues to service the extensive infrastructure improvements and governmental services to persons and property within reservations.

If, as the Yakima Nation requests, the continuation of nearly 100 years of state taxation of all Indian-owned fee patent land within reservations is construed as pro-

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[1] WSAC Amicus Curiae Brief in Support of Petition for Certiorari, App. p. 1a.

hibited, amici counties and all their Indian and non-Indian citizens will suffer great disruption of governmental services, both within and outside reservations.

Beyond these practical interests in preserving the land base for taxes which attach to real property, amici counties have a compelling concern for development of coherent and workable decisional law relating to taxation powers of state and local governments on Indian reservations. The decision of the Court of Appeals concluded that the express authorization by Congress of taxation of Indian lands within reservations upon issuance of fee patents under 25 U.S.C. § 349 remains effective. Nonetheless, the court below remanded the proceedings for further analysis under the plurality opinion in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 109 S.Ct. 2994 (1989), to determine whether such "taxation would affect [the Yakima Nation] in a demonstrably serious way[.]" *Confederated Tribes and Bands of Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1218 (9th Cir. 1990); Petition at 28a.

The opinion below at least contemplates the possibility that judicially developed principles could supersede explicit Congressional action. The Yakima Nation, in its Petition for Certiorari, eschews the appropriateness of review under *Brendale*, but asks directly for a judicial declaration that the express Congressional authorization of taxation of fee patented lands was repealed. It contends that the implication arises from subsequent statutes, which neither deal with tax exemption, nor with retroactive effect of any policies which were changed.

Amici Counties have an interest in encouraging the Court to reject such an improper exercise of judicial power in this and future cases. Amici are also interested in discouragement of any inference that Congress intended, by less than explicit action, to destroy vested

rights, efficient governmental operations, and legal certainty.

Amicus have great interest in showing the extraordinary impacts, which the cross-petition seeking retroactive application and implied repeal, would cause, and which may not be obvious.

ARGUMENT

The Washington State Association of Counties believes the Court should grant the relief requested by Petitioner/Cross-Respondent, Yakima County, for the following reason:

ANY JUDICIAL ATTENUATION OF THE FULL TAXABLE STATUS OF ANY FEE LAND, AS EXPRESSED IN 25 U.S.C. § 349, WOULD CREATE A SCHEME BOTH UNWORKABLE AND UNFAIR

The briefs of amici States and petitioner Yakima County clearly demonstrate that section 6 of the General Allotment Act (25 U.S.C. § 349)[2] has never been repealed by Congress, either expressly or by implication in the later Indian Reorganization Act (25 U.S.C. §§ 461 *et seq*). The legislative, judicial, and administrative history of these acts show that fee land on reservations, regardless of the race or tribal affiliation of the fee holder is fully taxable. Amicus WSAC will demonstrate to the Court in this brief both that local experience and practice fully support fact of taxability and also the untoward consequences and illogic of altering the law upon which this practice is based.

A. Current Federal Regulation and Practice Is Consistent With Local Taxation of Indian Owned Fee Land, Regardless of the Solicitor's Position in This Case

Respondent's novel theory, that fee land on a reservation is not taxable if found to be in Indian hands, was

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[2] Reproduced in full in WSAC Amicus Brief in Support of Petition for Cert., App. pp. 2a, 3a.

outside the pale of anyone's contemplation a few short years ago. The case of *City of Tacoma v. Andrus*, 457 F.Supp. 342 (D.C. Dist. 1978) is instructive as to the prevailing understanding of the law as recently as 1978.

The case arose when a number of Indians who lived within the historic boundaries of the Puyallup Reservation in Tacoma, Washington granted their property to the Secretary of Interior to be taken in trust by the United States for their own benefit, pursuant to 25 U.S.C. § 465 (App. p. 6a). The City of Tacoma and others sued in the District of Columbia Federal Court to enjoin the Secretary of Interior from future takings in trust. The major reason for this suit was the loss of tax revenues when land was taken into trust and the relief requested included a declaration that any lands already taken into trust would be subject to local taxation and regulation notwithstanding their trust status. 457 F.Supp. at 342-343.

The Bureau of Indian Affairs presented testimony in that case concerning the guidelines under which the bureau would take lands into trust. They declared that the Secretary would *only* accept property on reservations and *only* where the proposed beneficial owner was an enrolled member of the reservation tribe. 457 F.Supp. 343-344.

Judge Gesell of the District Court declined to "detail" what he considered to be appropriate circumstances for the exercise of the Secretary's "discretion." Noting that regulations setting forth the factors to be considered by the Secretary in determining whether to accept properties into trust were pending, the Court determined that the specific acquisitions in question were within the exercise of the secretary's discretion. *Id.* 457 F.Supp. 346.

After receiving much comment and holding several hearings on the proposed regulations to which Judge Gesell deferred, the Secretary of Interior adopted and published final regulations at 45 Fed. Reg. 62034-62037 on

September 18, 1980 setting forth the factors to be considered in evaluating every request for acquisition of property by the United States in trust for Indians or Indian tribes, *whether within reservations or in authorized areas outside reservations.*

The regulations reflect the uniform interpretations of the United States since the adoption of statutes authorizing fee patents which are recited in detail by the states and counties filing *amicus* briefs herein. The regulations were codified in 25 C.F.R. Part 120a [changed to Part 151 in 1982]. Section 151.10 reads in pertinent part as follows:

> In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors: . . .
>
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
>
> (f) Jurisdictional problems and potential conflict of land use may arise; and
>
> (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquistion of the land in trust status. . . . . (App. p. 7a.)

The foregoing sequence of events admits of only one interpretation. As late as 1978, the Bureau, the Tribe in question, the District Court, and the municipalities assumed that Indian owned fee land was taxable. Municipalities challenged the Secretary's action to take into trust fee land owned by Indians on a reservation, and that challenge was based on loss of taxable status. There is not even a hint in the case that any party believed that so long as the land was in the hands of an Indian it was automatically non-taxable. Such an interpretation would have rendered the litigation moot. The United States ad-

mitted in that case that the policy was to take into trust only lands that were on reservations.

Regulations were promulgated shortly thereafter to assess the jurisdictional and tax consequence of taking fee land into trust. Section 151.10 remains unchanged from that promulgation to the present. It has remained the interpretation of Congressional intent actually applied by the United States Department of the Interior, the department charged with implementing federal Indian statutes, both before and during the present proceedings. The new position taken in these proceedings by the Solicitor General simply ignores the continuing interpretation followed by the Department.

Appendix, pp. 1a-5a consists of two representative notices sent to counties on other reservations in Washington filed after the opinion below. The notices demonstrate the continuing practice of the Department specifically reciting the provisions of 25 C.F.R. Part 151.10 as applicable to the Secretary's determination whether to approve applications to accept reservation fee properties into trust.

Factors (e) through (g) of Section 151.10 would be meaningless unless it were the interpretation of the United States that fee lands are within the taxing jurisdiction of state and local government prior to acceptance in trust. The Court should infer that Congress expressed its acceptance of this 1980 interpretation, if not before, when it subsequently amended some of the statutes upon which the regulation was based, without expressly overruling the construction placed thereon by the Secretary. *United States v. Bd. of Commr's of Sheffield Alabama*, 435 U.S. 110, at 135, 136 (1978); *Lorillard v. Pons*, 434 U.S. 575 at 581, 582 (1978). The implied repeal of 25 U.S.C. § 349 suggested by the Yakima Nation and the Solicitor would make acceptance into trust unnecessary to remove fee land from state taxation. It would thereby render the statutes implemented by the Secretary virtually

meaningless. A construction that would render many statutes meaningless should not be indulged by the Court.

B. As a Consequence of and in Reliance Upon 25 U.S.C. § 349, Municipalities Have Built Infrastructure Improvements and Have Provided Services to Reservations, and They Continue to Do So

The stipulated facts for summary judgment in the case at bench (see Joint Appendix p. 36 *et seq.*) detail the extensive and expensive services and facilities provided by the State and municipalities on just the Yakima Reservation at issue. The Yakima experience is not unique. In many reservations the impact of the position espoused by the Yakima Nation would be much more striking. One example, the original Puyallup Reservation at issue in *Tacoma v. Andrus, supra,* is almost completely within the second most populous city in the state and two other small municipalities. Until recent acquisitions, trust property over which the Tribe exercised jurisdiction comprised less than 1% of the 22,000 acres in the original reservation. Political subdivisions of the State of Washington have provided all infrastructure and government services to fee property owned by Indians and non-Indians within the area. The industrial area of Pierce County and the second largest container port in the United States have been built within the area, primarily from state and local property tax revenues from the property served. The contention of the Yakima Nation that Indian fee land now owned, or hereafter acquired, within reservations should be exempt from taxes upon property would affect many reservations much more than on the Yakima reservation.

Section 6 of the Allotment Act (25 U.S.C. § 349) resulted in the enlargement of local jurisdiction for all purposes within reservations. This was evidently the intent of the Act itself. *Montana v. U.S.*, 450 U.S. 544, at 559, n.9 (1981). As the amount of reservation land allotted in fee increased, the services and jurisdiction taken by State and local governments increased concomitantly.

It was the fee status described in § 349 that caused this enlargement of local jurisdiction. Municipalities built roads, started schools, and performed law enforcement, social service, and all other government functions. Counties, cities and states continue to own, pay debt service upon, and maintain these facilities and services upon fee lands over which we were granted jurisdiction. The services and infrastructure must be paid for. The tax upon land patented in fee has always been, and continues to be, the primary source of repaying bond issues which were necessary to build the infrastructure, and of paying for the services required within the reservations as a result of actions taken under the General Allotment Act.

Clearly Indian governments and the Federal Government also provide significant services and even infrastructure improvement on reservations, as they should. On some reservations, much land is held in trust by the Federal Government for tribes or their members, and a rough symmetry has evolved between the amount of trust land and the services provided by the United States and the tribe.

Though state and local jurisdictions provide services to Indians on some trust land and tribal government and the United States provide services on some on fee land within reservations, the amount of services provided by state and local governments is also roughly proportional to the amount of fee land on reservations. For the Court to rip away municipal funding based on the blood lines of the person who happens to hold title to property in the year of assessment would deprive all reservation citizens of much needed services and would make maintenance of and payment for existing infrastructure improvements difficult, if not impossible.

For those items of infrastructure owned by state and local governments, the resulting loss of tax base would amount to a federal taking of municipal property. The roads, bridges, hospitals and schools were purchased, and

have been or must be paid for by all of the citizens of the local jurisdiction. To deprive the state and local jurisdictions of the tax revenue necessary to pay for and maintain infrastructure improvements and to pay for services upon which the area has come to depend is fundamentally unfair, if not unconstitutional.

Real estate taxes constitute a major source of revenue for services and facilities. In the state of Washington, these taxes are the primary source of revenue for political subdivisions. The total amount of property tax that can be collected by any political subdivision in Washington without a super-majority vote is constitutionally limited to 1% of the property value, no matter how much the value of the tax base declines. Wash. Const. Art. VII, § 2 (WSAC Amicus Brief in Support of Petition for Certiorari, App. pp. 4a, 5a.) Because the need for governmental services continues to increase, the effect of constitutional and statutory limitations is that most jurisdictions in Washington are already levying a tax rate on all taxable property at or near the maximum statutory rate allowed by law. Thus local governments cannot assign more of the tax burden to the non-Indian owned fee land. The contention of the Yakima Nation would presently deprive many state and local governments of necessary revenue for the areas over which they have extended facilities and services. The effect upon most states would be similar.

If Tribal or Federal governments assumed the obligation of providing services to such property, as is done when property is to be accepted into trust, at least many expensive obligations for future services would be reduced, though ownership and maintenance of existing facilities would not be resolved. Neither the Tribe nor the United States suggest that they would be required to relieve states and local governments from future obligations to Indian fee land simply upon purchase in fee by a tribal member within a reservation. Even if they were required or willing to do so, they would have the same

problem that state and local governments experience in budgeting and providing necessary services, if change in tax status could occur simply by private purchase. Under the present process, trust applications can occur only after the tax consequence of acceptance is known.

Even if it were within the power of Congress to unilaterally remove jurisdictional rights vested in states under express statutes and accepted by them, which we believe it is not, state and local governments should not be subjected to the devastating result, by a judicial construction. Repeal must be based on clear and unequivocal Congressional language changing the relevant provisions of former law, and expressing an intention that the repeal be given retroactive effect.

C. A Finding That Fee Land Owned by Indians Is Not Subject to Taxation Would Increase Jurisdictional Confusion on Reservations Rather Than Lessen the "Checkerboard" Effect

As we pointed out in our amicus curiae brief in support of the Petition For Certiorari, this Court's doubt about the desirability of "checkerboard jurisdiction" was expressed in a case where eschewing it promoted sensible government. That doubt is not, however, a rule of law to be invoked when it will result in chaos. See WSAC Cert. Brief at page 5.

Respondent Yakima Indian Nation has invoked the concept of "checkerboard jurisdiction" as a sort of taboo term with thaumaturgical properties, which requires that when the phrase is invoked, all legal analysis must be abandoned so that checkerboarding can be avoided. Amicus WSAC pointed out in its certiorari brief that the existing obligation of assessors to search land title records makes real property tax determinations, which are dependent upon whether property is held of record in trust by the United States, a normal part of the assessment function. Preserving the different tax treatment created

by Congress between trust and fee lands within reservations would not burden tribes or state and local governments; differing criminal jurisdiction or even the assessment of tax upon sales or personal property might. It is the duty of the Assessor to "search tract books" in applying the tax, whereas the police officer's function might be unduly constrained if he were forced to do a title search before he could arrest an Indian on reservation land. See *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 at 358 (1961).

A finding of tax immunity on Indian owned fee land would further fractionalize jurisdictional interests rather than minimizing them, would make them more uncertain the boundaries between jurisdictions. Since the adoption of 25 U.S.C. § 349, there have been two types of interests having different tax treatment ((1) land held in trust by the United States Government, and (2) land held in fee that is fully alienable). If the position of respondent Yakima Indian Nation prevails, three types of interests involving tax jurisdiction affecting real property will be created, ((1) trust land, (2) taxable fee land owned by non-Indians, and (3) non-taxable but alienable fee land owned by Indians). The borders of these categories will change from day-to-day, depending on who sells what land to whom. The chaotic consequences for local jurisdictions and tribes from this kind of scheme should be self evident. Local officials can search land records to find out whether record title has been accepted by the United States in trust. That has always been part of their function. They are ill equipped to search the blood lines of the title holder, however, and Congress should not be deemed to have required them to do so, particularly without finding express language restoring tax exemption retroactively to support an implication that repeal was intended.

D. The Inability of Officials to Determine the Tax Status of the Fee Holder by Title Search Will Render the Budget Process of States and Political Subdivision Unmanageable

The shifting tax jurisdiction lines described above, based not on the facts disclosed of record, but on the lineage of the title holder at a given time, is more than just a headache for the officials who assess taxes. It will also, as described in our amicus brief in support of certiorari, render the budget process unmanageable. The reasons bear repeating here.

It is the law in Washington State that each political subdivision must spread the tax burden equally over all taxable property within the taxing district. Wash. Rev. Code Section 84.52.040 (WSCA Amicus Brief in Support for Petition for Certiorari, App. p. 6a.) Municipal officials must set levy rates with this goal in mind.

On or before the 30th of November of each year, the budgets and amounts and rates of tax to be levied for the next year for all political subdivisions of the State must be certified to the County Assessor. Wash. Rev. Code Section 84.52.070 (WSAC Amicus Brief in Support of Petition for Certiorari, App p. 6a). Mosts states use similar procedures to determine real property tax levies.

If the decision of the Court of appeals remanding for consideration in light of *Brendale v. Confederated Tribes*, 109 S.Ct. 2994 (1989) is allowed to stand, as none of the parties believe it should, case-by-case litigation of the taxable status of every piece of Indian-owned fee land every year could result.

If the more certain interpretation espoused by the Yakima Nation were adopted instead, states and municipalities would still be unable to anticipate the level of revenue upon which they can plan, because taxability would depend on the whimsical nature of private real estate transactions from year to year. It would be vir-

tually impossible for taxing officials to know what reservation property is taxable and what is not taxable before making irrevocable budgeting and expenditure decisions, if taxability depended upon the race and enrollment status of the title holder. Indeed title could change from Indian to non-Indian hands and then back into Indian hands all within a single assessment year. Because tribal membership of owners would not be known until the owner chose to come forward to provide evidence, it is almost certain that it would be several years after levy of taxes, and after obligation of funds, in reliance upon a known quantity of taxable land, that counties would learn of claimed exemptions of Indian-owned fee land within reservations. The reduction in real property liable to pay tax would become known only long after all services for which tax was levied have been provided, and long after the opportunity to reduce expenditures or spread the loss over the rest of the taxable property had expired.

Unlike the existing trust acquisition process which has been determinative of tax exemption for land within reservations under the existing law, no event such as recording of acceptance by the United States of a deed in trust would be available upon which state and local officials could rely to determine what property is or is not taxable within reservations. Presumably this is one of the reasons Congress chose to create the process of authorizing acceptance of feel land in trust, rather than repealing the provisions of 25 U.S.C. § 349 which rendered property taxable upon issuance of a fee patent and 25 U.S.C. § 465 which restored exemption upon acceptance into trust. This is yet another reason why the Court should not infer that Congress intended to repeal the provisions of § 349.

If taxability depends on the race and enrollment status of the fee holder not disclosed by title records, state and local jurisdictions will be faced with numerous new legal

and budgetary problems. For example, Washington law provides a three year grace period before the state can foreclose on real property for non-payment of taxes. Wash. Rev. Code Section 84.64.050 (App. pp. 8a-10a). What would happen if title passes from non-Indian to Indian hands within the three year period without payment of back taxes, penalties, and interest still owing on the property, with no opportunity for the United States to require payment of existing liens before acceptance of title? Could the jurisdiction still foreclose on the property, because the lien arose before the property became exempt?

E. A Finding That Fee Land on Reservations Is Not Taxable in Indian Hands Would Greatly Expand the Opportunities for Abuse Without Detection

If tax jurisdiction rides not on whether record title is in the United States in trust, but upon the race of the record title holder, the way is opened for a multitude of abuses. Nothing would prevent non-Indians seeking to avoid taxation of reservation fee land, from transferring record title to an enrolled tribal member, while preserving beneficial use by contract or otherwise. Scrutiny by the United States which currently surrounds acceptance of property into trust would not exist. Large commercial buildings, residential tracts, farms, and forests could be, and we believe *will be* transferred to Indian "fronts" for token consideration with conditions so strict that all beneficial use will inure to the non-Indian transferor. If respondent Yakima Nation's position is upheld by this Court, nothing would preclude such a practice. It would be difficult for Congress to remedially amend the law so as to avoid these abuses so long as taxability depends on the race of the record title holder rather than whether record title is in the name of the United States.

CONCLUSION

Amicus curiae, Washington State Association of Counties, respectfully requests that Washington tax which attaches to real property be deemed applicable to all lands held in fee as to which fee patents issued pursuant to the General Allotment Act. It further requests that the Court of Appeals judgment be reversed to the extent it held that consideration of whether such tax imperils the respondent/cross-petitioner's political integrity, economic security, health or welfare.

Respectfully submitted,

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